

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY GENE DENHOF,

Defendant-Appellant.

UNPUBLISHED

December 14, 2010

No. 287720

Kent Circuit Court

LC No. 08-003097-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age). Defendant was sentenced to serve a concurrent prison term of 14 to 75 years for each count. We affirm.

I. BASIC FACTS

The charges in the instant case stem from defendant's sexual assaults of his daughter from approximately 2001 through 2005. The victim testified that the first incident of abuse occurred at the family home during the summer of 2001 or 2002. She indicated that defendant continued to abuse her after her parents divorced. The abuse occurred at a hotel where defendant stayed while exercising his visitation rights. The victim first reported the abuse to a friend, who encouraged her to tell an adult. The victim was later examined by a medical doctor, who found that her hymen had been transected or lacerated.

II. INEFFECTIVE ASSISTANCE

Defendant claims he was denied the effective assistance of counsel due to numerous errors on the part of trial counsel. We disagree.

Whether a defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and issues of constitutional law are reviewed de novo by this Court. *Id.* In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a

defendant must show that the “deficient performance prejudiced the defense.” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Id.*

Defendant first argues that defense counsel rendered ineffective assistance of counsel when he failed to investigate and present an expert forensic clinical psychologist and an expert medical doctor at trial. With respect to the clinical psychologist, defendant argues that Dr. Katherine Okla, Ph.D., a forensic psychologist, could have testified that the victim did not exhibit characteristics commonly exhibited by child victims of sexual abuse, and that defendant did not exhibit characteristics common in pedophiles.

Generally, decisions regarding whether to call an expert witness are presumed to be matters of trial strategy that we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Failure to call an expert witness “only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.* A “substantial defense” is a defense that “might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). While Okla’s testimony was admissible and would have helped the defense, we find that the expert testimony did not amount to a substantial defense because it would not have altered the outcome of the trial. *Id.* At a *Ginther*¹ hearing, Okla testified that the victim did not exhibit characteristics commonly exhibited by child victims of sexual abuse, including avoidance of the abuser, anxiety, increased hostility or aggression, depression, social or academic impairment, and increased sexual activity or sexualized knowledge or behavior. This testimony would not have been significant where the victim could not avoid defendant and there was no evidence showing that the victim did not suffer from anxiety or increased hostility or depression. Moreover, the victim exhibited increased sexualized knowledge at trial when she described in detail the sexual acts that defendant perpetrated upon her. Although it appears that the victim’s grades at school did not suffer, Okla did not state that all victims of sexual abuse perform poorly in school. In addition, the victim gave detailed testimony concerning the abuse, and medical findings were consistent with her assertion that defendant sexually penetrated her. The victim stated that defendant was the only man to have penetrated her vagina with his penis and there was no other evidence to refute this assertion. In addition, defense counsel’s cross-examination of Dr. Eugene Shatz, who performed a physical examination of the victim, included questions about some aspects of the characteristics commonly displayed by child sexual abuse victims, including behaviors typical to child sexual abuse victims that were not present in this case. Further, in regard to Okla’s proposed testimony concerning characteristics of pedophiles, the jury was made aware that defendant did not engage in “grooming” behavior when Shatz agreed with defense counsel that no grooming process could be identified in this case. We will not second guess counsel’s decision not to call an expert forensic clinical psychologist. *Dixon*, 263 Mich App at 398.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

With respect to defense counsel's failure to call a medical doctor as an expert witness, defendant argues that an expert was needed to show that the victim's transected hymen was not a "definite" sign of sexual abuse, but instead was "consistent with" sexual abuse. At trial, Shatz testified that, after performing a physical exam, and after considering the statements the victim made during the medical interview, his diagnosis was "probable sexual abuse, definite evidence of abuse and her story corroborated." In contrast, at the *Ginther* hearing, Dr. Lawrence Schappa testified that he would classify the finding as "consistent with" sexual abuse, but not "conclusive of" sexual abuse. However, Schappa agreed that the laceration found by Shatz was a definite sign of penetration.

We find that defendant was not deprived of a substantial defense when defense counsel failed to call Schappa or another medical doctor to testify at trial. Schappa agreed that a laceration to the hymen was a definite sign of penetration, and the victim testified that defendant was the only person who penetrated her. Thus, the testimony would not have provided a substantial defense. *Dixon*, 263 Mich App at 398.

Next, defendant argues that defense counsel rendered ineffective assistance of counsel when he failed to interview and call defendant's wife, Blair Denhof, as a defense witness at trial, and failed to conduct a pretrial interview of the two defense witnesses that were called to testify. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. Defendant argues that defense counsel failed to adequately communicate with Blair prior to trial and should have called her as a witness to testify that she often traveled with defendant when he visited Michigan. Defense counsel testified at the *Ginther* hearing that he had concluded that Blair would not make a good witness after communicating with her on several occasions prior to trial. Defense counsel further testified that Blair had not indicated when he spoke with her that she had traveled to Michigan with defendant. To the extent this issue involves a credibility contest between Blair and defense counsel, we defer to the trial court's findings. See MCR 2.613(C); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999) (the trial court's "resolution of a factual issue is entitled to deference," particularly where it "involves the credibility of the witnesses whose testimony is in conflict").

With respect to defendant's argument that defense counsel was ineffective for failing to interview the defense witnesses, defendant fails to articulate how defense counsel could have approached direct examination differently had he first interviewed the witnesses. Therefore, he cannot show that, but for counsel's failure to conduct interviews, the result of the proceeding would have been different. *Carbin*, 463 Mich at 599-600.

Defendant also argues that defense counsel's failure to obtain Ottawa County Friend of the Court (FOC) documents from defendant's prior divorce proceeding, failure to obtain Shatz's medical photographs, and failure to secure expert advice on the documents amounted to ineffective assistance of counsel. With regard to the FOC documents, the trial court obtained the documents and conducted an in camera review and held that there was nothing in the records that would have assisted the defense. After reviewing the documents, we hold that the trial court's finding that they would have been of no value to the defense was not clearly erroneous. *LeBlanc*, 465 Mich at 579. Thus, counsel was not ineffective for failing to obtain them for trial.

In addition, defendant's failure to provide any discussion regarding the medical photographs and the retention of experts to analyze the documents constitutes abandonment of this portion of his claim for review. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments....").

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to file a bill of particulars. Defendant claims that the information was deficient because it did not contain any reference to the date, the time, or the location of the offenses. Defendant asserts that counsel was unable to "investigate defenses" without a bill of particulars. We disagree.

"The information duly notifies a defendant of the charges instituted against the defendant and further eradicates double jeopardy issues in the event of a retrial." *People v Wacławski*, 286 Mich App 634, 706; 780 NW2d 321 (2009). MCR 6.112(D) provides that the information in a criminal case must contain the substance of the accusation against the defendant, as well as the name, statutory citation, and penalty for the charged offenses. With respect to timing and location, the court rule provides, "[t]o the extent possible, the information should specify the time and place of the alleged offense." MCR 6.112(D). However, "this Court has held that time is not of the essence, nor is it a material element, in a criminal sexual conduct case, at least where the victim is a child." *Id.* at 707-708. In this case, the information and the amended information complied with the requirements of the court rule. Further, defendant cannot show defense counsel's failure to request a bill of particulars amounted to prejudice. Defendant fails to articulate what other defenses counsel could have "investigated" if he had requested a bill of particulars, and how it could have affected the outcome of the trial. Thus, he has failed to show he was denied the effective assistance of counsel in this respect. *Carbin*, 463 Mich at 599-600.

In addition, defendant argues that counsel rendered ineffective assistance of counsel when he failed to cross-examine the victim regarding "numerous" prior inconsistent statements she made during the course of the police investigation. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy. *Rockey*, 237 Mich App at 76. Our review of the record demonstrates that defense counsel engaged in vigorous cross-examination and impeachment of the victim wherein he attacked her credibility and advanced the theory that she was influenced into making false allegations against defendant. Defense counsel's approach during cross-examination was reasonable trial strategy and his failure to cross-examine in the manner defendant now advocates did not constitute ineffective assistance of counsel.

Defendant further argues that counsel was ineffective when he failed to object to the introduction of the following evidence: portions of the DVD recording of defendant's police interview, Shatz's "improper expert testimony," and, the prosecutor's improper rebuttal argument.

With respect to the DVD police interview, defendant asserts that the DVD was inadmissible because the interviewing officer vouched for the veracity of the victim and misrepresented the medical evidence. Defendant fails to cite any legal authority to show that the DVD was inadmissible and fails to cite to the record; instead, he cites to another section of his brief. Defendant's cursory treatment of this issue constitutes abandonment. *Kevorkian*, 248

Mich App at 389. Moreover, as discussed *infra*, the DVD was properly admitted at trial, and defense counsel is not ineffective for failing to raise a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

With respect to defendant's argument regarding Shatz's testimony, defendant claims that defense counsel should have objected when Shatz made a "conclusive" medical opinion regarding the ultimate issue in this case, i.e. that sexual abuse in fact occurred. Defendant also argues that counsel should have objected to Shatz's improper testimony concerning the "psychological aspects of this case." Defendant has abandoned the portion of his argument concerning Shatz's testimony on the "psychological aspects" of this case. Defendant provides no discussion on the topic, fails to cite to the record and identify the purported improper testimony, and fails to provide any legal authority in support of his argument. See *Kevorkian*, 248 Mich App at 389.

In regard to Shatz's testimony on the "ultimate issue" in this case, Shatz testified that the victim's statements during the exam, in conjunction with his physical findings, resulted in a diagnosis of "probable sexual abuse" and showed "definite evidence of abuse" and that the victim's story "[was] corroborated." In CSC cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995). We find that Shatz's testimony was an improper opinion regarding the ultimate issue in this case. The plain inference arising from Shatz's testimony was that the sexual abuse occurred, and that the victim was telling the truth. This was improper. *Id.* Nevertheless, defense counsel's failure to object did not affect the outcome of the trial. Shatz offered proper testimony that his physical findings revealed that the victim suffered blunt force trauma to her hymen, and he explained that this could only happen through penetration. This was strong evidence of defendant's guilt. The victim testified that defendant was the only person who penetrated her and there was no evidence to the contrary, i.e. that someone else penetrated the victim. Additionally, defendant's credibility was undermined when the victim and another witness offered testimony that contradicted what defendant told police. Further, defendant damaged his credibility when he stated that he was not surprised by the allegations during his police interview, and then he could not explain why he was not surprised. Defendant also agreed that he slept in hotels with his two children, and both children testified that they were in the hotel rooms alone with defendant. A reasonable juror could infer that this amounted to evidence of opportunity. Although defense counsel should have objected to portions of Shatz's testimony, relief is not required because defendant cannot show that, but for defense counsel's error, the result of trial would have been different. *Carbin*, 463 Mich at 599-600.

In regard to defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's improper rebuttal argument, defendant provides no analysis or citation to the record and instead cites to another portion of his brief, wherein he does not address ineffective assistance of counsel. Defendant has therefore abandoned this aspect of his argument for review. *Kevorkian*, 248 Mich App at 389.

Defendant's final argument that he was denied the effective assistance of counsel relates to defense counsel's decision to introduce prejudicial evidence regarding prior incidents of domestic violence between defendant and his former wife, the victim's mother. Defense counsel

explained that he introduced the evidence in an attempt to show that the victim's mother influenced her into making false accusations. Even if we were to conclude trial counsel's performance in this respect fell below an objective standard of reasonableness, the prior bad-acts evidence did not affect the outcome of the trial. The evidence of domestic abuse was dissimilar to the charged offenses and it happened several years before the trial, which reduced its prejudicial effect. Additionally, the victim's testimony remained consistent throughout the trial, and Shatz's physical findings supported that the victim's vagina was penetrated. The victim testified that defendant was the only person who penetrated her. Thus, defendant was not denied the effective assistance of counsel in this respect. *Carbin*, 463 Mich at 600.

III. CUMULATIVE ERROR

Defendant contends that the cumulative effect of all of trial counsel's errors resulted in prejudice warranting reversal. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). The effect of the errors must have been "seriously prejudicial" in order to warrant reversal. *Id.* However, "only actual errors can be aggregated to establish cumulative error." *LeBlanc*, 465 Mich at 591-592, n 12. As discussed above, among the numerous assertions of error on the part of trial counsel, we find defense counsel acted deficiently only when he failed to object to Shatz's testimony concerning the ultimate issue in this case, and when he introduced prior bad-acts evidence. We nevertheless hold on the record before us that the combined effect of these errors did not result in serious prejudice warranting reversal.

IV. PROSECUTORIAL MISCONDUCT

Next, defendant claims he was denied a fair trial when the prosecutor introduced a DVD recording of his police interview. Defendant failed to preserve this issue for review because he did not object on the same basis in the trial court. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review unpreserved evidentiary issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During the police interview, an officer informed defendant that medical evidence showed "definite signs" of abuse and that the abuse occurred well in the past, that the victim alleged she was sodomized, that the victim's forensic interview could be "forensically analyzed," and that he believed the victim because she would not fabricate the allegations because of a grudge. Defendant contends that the officer's statements amounted to improper vouching for the veracity of the victim, and were inadmissible under MRE 403. We disagree.

"[I]t [is] improper for a witness to comment or provide an opinion on the credibility of another witness since matters of credibility are to be determined by the trier of fact." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985) (quotation omitted). However, an out-of-court statement may be used for purposes other than establishing the truth of the matter asserted. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). A statement can be admissible to show its effect on the listener. *Id.* at 11. See *People v Johnson*, 100 Mich App 594, 599; 300 NW2d 332 (1980) (comments of a police officer on a recording of a police interview were admissible to put the defendant's statements in context).

In this case, the officer's statements were not offered for their truth, but instead were properly introduced to show their effect on defendant and to provide context for defendant's statements during the interview. In addition, the statements were not inadmissible under MRE 403, which provides that relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. The danger of unfair prejudice exists where "marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, there was no danger that the jury would give undue or preemptive weight to the officer's statements on the DVD. With respect to the statements regarding the medical evidence, the jury heard Shatz's expert medical testimony that was properly admitted and accurately summarized the medical findings. With respect to the officer's reference to sodomy, there was no testimony that the victim was sodomized. With regard to the officer's statements that he believed the victim, and that the forensic interview could be analyzed for truthfulness, the trial court limited any prejudicial impact when it instructed the jury that it was the only finder of fact and it was responsible for determining the credibility of the witnesses. See *Unger*, 278 Mich App at 235 ("[J]urors are presumed to follow their instructions"). Because the DVD was properly admitted at trial, defendant's argument that the prosecutor acted improperly in introducing the DVD fails.

Next, defendant argues that he was denied his right to a fair trial and his due process rights when the prosecutor committed misconduct during his closing and rebuttal arguments. Defendant failed to preserve this issue for review because he did not make contemporaneous objections and requests for curative instructions at trial. *Id.* at 234-235. We review unpreserved claims of prosecutorial misconduct for outcome-determinative plain error. *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements ... and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citation omitted).

The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor jeopardizes a defendant's right to a fair trial when he or she interjects issues into trial that are broader than guilt or innocence of the accused. *Id.* at 63-64. During closing argument, the prosecutor referenced the medical findings that showed the victim had a laceration to her hymen and stated the "body never lies" and that the medical findings showed "definite" signs of abuse. Defendant contends these statements amounted to misconduct. "Generally, prosecutors are accorded great latitude regarding their arguments, and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). In addition, a prosecutor is free to argue that, based on the facts, a witness should be believed. *Id.* In this case, we find that the prosecutor's comments amounted to proper inferences drawn from the evidence at trial. The statements defendant now challenges were connected to the physical evidence that showed the victim suffered a torn hymen caused by penetration of the vagina.

At another point during his closing argument, the prosecutor stated, “Ottawa County’s waiting to see what happens here, you know.” At the time of trial, defendant faced potential charges in Ottawa County. Defendant contends this comment was improper, and we agree. A prosecutor may not argue facts that are not supported by the evidence, or urge the jury to convict as part of its civic duty. *Unger*, 278 Mich App at 237, 241. Here, whether Ottawa County decided to prosecute defendant in a separate proceeding was not part of the evidence and was irrelevant to the issues at bar. *Id.* However, we find that a curative instruction cured any prejudice caused by the prosecutor’s inappropriate statement, and, therefore, the error does not warrant reversal. *Callon*, 256 Mich App at 329. In this instance, the prosecutor’s comment was brief and the trial court instructed the jury that statements of the attorneys were not to be considered as evidence.

Defendant also asserts that the prosecutor engaged in misconduct when he referenced the “psychological aspects” of Shatz’s testimony. Defendant fails to articulate how Shatz’s testimony was inadmissible and should not have been referenced during closing argument. Accordingly, defendant has abandoned this portion of his argument for review. *Kevorkian*, 248 Mich App at 389.

Defendant finally argues that the prosecutor committed misconduct during his rebuttal argument by arguing that there was evidence of “emotional grooming” and that defendant’s responses during the police interview showed his guilt, and by arguing facts outside the scope of defense counsel’s closing argument.

The argument concerning defendant’s responses and what defendant did not say during the police interview was relevant and admissible as conduct evincing a consciousness of guilt. See *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). Similarly, the prosecutor’s argument regarding “emotional grooming” was a proper inference arising from the evidence. See *Seals*, 285 Mich App at 22. In any event, the trial court instructed the jury that statements of the attorneys were not to be considered as evidence; thus, curing any prejudice stemming from the challenged arguments. *Unger*, 278 Mich App at 235.

However, with respect to the scope of the prosecutor’s rebuttal argument, we find that the prosecutor committed misconduct by arguing facts that were clearly outside the scope of defense counsel’s closing argument. MCR 6.414(G) governs the parties’ closing arguments in a criminal trial and provides in relevant part that, “If the defendant makes an argument, *the prosecutor may offer a rebuttal limited to the issues raised in the defendant’s argument*” (emphasis added). In this case, the prosecutor’s rebuttal argument was in clear violation of the court rule. The prosecutor offered extensive argument regarding the DVD recording of defendant’s police interview even though defense counsel did not address the police interview or defendant’s statements during his closing argument. Nevertheless, we find that the prosecutor’s misconduct did not affect defendant’s substantial rights or ultimately result in “the conviction of an actually innocent defendant or seriously affect[] the fairness, integrity, or public reputation of judicial proceedings;” and therefore reversal is not warranted. *Callon*, 256 Mich App at 329.

V. EVIDENTIARY RULINGS

Next, defendant argues that the trial court abused its discretion and denied him his due process rights when it allowed Shatz to exceed his area of expertise and offer testimony

concerning the “psychological aspects of this case.” Because defense counsel explicitly agreed at trial to admit Shatz’s testimony as an expert in the field of psychological aspects of child sexual abuse, defendant has waived any claim that the trial court erred in admitting Shatz’s expert testimony for that purpose. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation omitted) (“[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error”).

Finally, defendant argues that the trial court abused its discretion when it refused to release privileged FOC documents following an in camera review during the *Ginther* hearing. We review a trial court’s refusal to disclose privileged records for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). After reviewing the FOC records, we conclude that the trial court did not abuse its discretion in refusing to release the records; there was nothing in the records that would have been of value to the defense at trial.

Affirmed.

/s/ Joel P. Hoekstra

/s/ E. Thomas Fitzgerald